



## **ENVIRONMENTAL PROTECTION AGENCY**

**[FRL-9836-7]**

### **California State Motor Vehicle Pollution Control Standards; Urban Buses; Request for Waiver of Preemption; Notice of Decision**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of Decision.

**SUMMARY:** EPA is granting the California Air Resources Board (CARB) its request for a waiver of preemption for emission standards and related test procedures contained in its urban bus regulations as they affect the 2002 and later model years. Urban buses are conventionally powered by a heavy-duty diesel engine that falls within the heavy-duty vehicle classification of greater than 33,000 pounds gross vehicle weight, and are intended primarily for intra-city operation, i.e., within the confines of a city or greater metropolitan area.

**DATES:** Petitions for review must be filed by [INSERT DATE SIXTY DAYS AFTER FR PUBLICATION DATE OF THIS NOTICE].

**ADDRESSES:** EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2012-0745. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading

Room is (202) 566-1744. The Air and Radiation Docket and Information Center's Web site is <http://www.epa.gov/oar/docket.html>. The electronic mail (e-mail) address for the Air and Radiation Docket is: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov), the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the [www.regulations.gov](http://www.regulations.gov) website, enter EPA-HQ-OAR-2012-0745 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality (OTAQ) maintains a webpage that contains general information on its review of California waiver requests. Included on that page are links to prior waiver *Federal Register* notices, some of which are cited in today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

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**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Chronology*

By letter dated November 16, 2009, CARB submitted to EPA its request for a waiver of preemption pursuant to section 209(b) of the Clean Air Act (CAA or the Act), for its urban bus regulations.<sup>1</sup> California's urban bus regulations principally set requirements for California's public transit agencies that operate urban buses and other transit vehicles; additionally, the rulemakings set emission standards for new urban bus engines. CARB formally adopted these urban bus regulations during five separate rulemakings that took place between 2000 and 2005: a 2000 rulemaking, a 2002 rulemaking, a 2004 rulemaking, a February 2005 rulemaking, and an October 2005 rulemaking. Collectively, the five rulemakings elevated the stringency of exhaust emission standards and test procedures for heavy-duty urban bus engines and vehicles. The 2000 rulemaking included more stringent particulate matter ("PM") emission standards for diesel-fueled urban bus engines through the 2006 model year; more stringent mandatory and optional nitrogen oxides ("NO<sub>x</sub>") and non-methane hydrocarbon ("NMHC") standards for diesel-fueled urban bus engines through the 2003 model year; more stringent optional combined NMHC+ NO<sub>x</sub> and PM standards for alternatively-fueled urban bus engines through the 2006 model year; more stringent primary emission standards for diesel-fueled urban buses through the 2006 model year; tightening of exhaust emission standards for 2007 and later model year heavy-duty urban diesel engines; and adoption of urban bus test procedures and label specifications. The 2000 rulemaking was formally adopted by CARB on November 22, 2000 and May 29, 2001,<sup>2</sup> and became operative under California law on January

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<sup>1</sup> CARB, "Request for Waiver Action Pursuant to Clean Air Act Section 209(b) for California's Urban Bus Emission Standards," EPA-HQ-OAR-2012-0745-0004, (November 16, 2009).

<sup>2</sup> CARB, "Resolution 00-2," February 24, 2000; CARB, "Executive Order G-00-060," (November 22, 2000); CARB, "Executive Order G-01-010," (May 29, 2001).

23, 2001 and May 29, 2001, respectively.<sup>3</sup> The 2002 rulemaking allowed for an optional NMHC+ NO<sub>x</sub> standard for 2004-2006 model year diesel-fueled urban bus engines when used in exempted transit fleets with commitments to demonstrate advanced NO<sub>x</sub> after-treatment technology, and established a certification procedure for hybrid electric buses. The 2002 rulemaking was formally adopted by CARB on September 2, 2003,<sup>4</sup> and became operative under California law on November 15, 2003.<sup>5</sup> The 2004 rulemaking added optional exhaust emission standards for diesel-fueled hybrid-electric urban bus engines for authorized transit agencies with NO<sub>x</sub> mitigation plans for the 2004-2006 model years. The 2004 rulemaking was formally adopted by CARB on June 24, 2004,<sup>6</sup> and became operative under California law on January 31, 2004.<sup>7</sup> The February 2005 rulemaking clarified the optional standards for hybrid-electric buses that were allowed in the 2004 rulemaking. The February 2005 rulemaking was formally adopted by CARB on February 24, 2005,<sup>8</sup> and became operative under California law on January 31, 2006.<sup>9</sup> The October 2005 rulemaking amended the urban bus standards to align with California's existing exhaust emission standards for heavy-duty diesel engines. The October 2005 rulemaking was formally adopted by CARB on July 28, 2006,<sup>10</sup> and became operative under California law on

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<sup>3</sup> CARB, "Secretary of State Face Sheet and Final Regulation Order," effective January 23, 2001; CARB, "Secretary of State Face Sheet and Final Regulation Order," effective May 29, 2001.

<sup>4</sup> CARB, "Resolution 02-30," (October 24, 2002); CARB, "Executive Order G-03-023," (September 2, 2003).

<sup>5</sup> CARB, "Secretary of State Face Sheet and Final Regulation Order," effective November 15, 2003.

<sup>6</sup> CARB, "Resolution 04-19," (June 24, 2004).

<sup>7</sup> CARB, "Secretary of State Face Sheet and Final Regulation Order," effective January 31, 2004.

<sup>8</sup> CARB, "Resolution 05-15," (February 24, 2005).

<sup>9</sup> CARB, "Secretary of State Face Sheet and Final Regulation Order," effective January 31, 2006.

<sup>10</sup> CARB, "Resolution 05-47," (September 15, 2005); CARB, "Resolution 05-53," (October 20, 2005); CARB Resolution 05-61," (October 27, 2005); CARB, "Executive Order R-05-007," (July 28, 2006).

October 7, 2006.<sup>11</sup> The revisions to emission standards and test procedures resulting from these five sets of amendments were codified at title 13, California Code of Regulations, section 1952.2 *et seq.*, which was later renumbered to section 2023 *et seq.*<sup>12</sup>

CARB seeks a waiver of preemption pursuant to section 209(b) of the Clean Air Act for the emission standards and related test procedures contained in its urban bus regulations, as amended through 2000 and 2005.

### *B. CARB's Urban Bus Rulemakings*

There are two basic components to the rulemakings from 2000 to 2005 for urban buses: (1) more stringent emission standards for new urban bus engines applicable to urban bus engine manufacturers, along with amendments to the test procedures for determining compliance with the standards; and (2) transit agency fleet rules<sup>13</sup> applicable to public transit agencies that own or lease urban buses and other transit vehicles to provide transportation services to the public directly or through contracted services. This section discusses the emission standards and amendments to test procedures for which CARB requests a new waiver of preemption.<sup>14</sup>

#### *1. 2000 Rulemaking*

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<sup>11</sup> CARB, "Secretary of State Face Sheet and Final Regulation Order," effective October 7, 2006.

<sup>12</sup> See *supra* notes 5, 7, 9, 11, and 13.

<sup>13</sup> CARB's transit agency fleet rules are not covered by CARB's waiver request and will not be subject to waiver analysis. CARB represents that the fleet rules are not preempted under CAA section 209(a) because CARB's directions to transit agencies to purchase and lease specified buses and vehicles with given engine technologies or with given emission limits by specified dates fall with the market participant doctrine, as articulated by the 9<sup>th</sup> Circuit Court of Appeals. *Tocher v. City of Santa Ana et al.* (9<sup>th</sup> Cir. 2000) 219 F.3d 1040, 1050. CARB, "Clean Air Act §209(b) Waiver Support Document Submitted by the California Air Resources Board," EPA-HQ-OAR-2012-0745-0004, (November 2009), at page 1.

<sup>14</sup> CARB, "Clean Air Act §209(b) Waiver Support Document Submitted by the California Air Resources Board," EPA-HQ-OAR-2012-0745-0004, (November 2009), at page 4.

The 2000 amendments to the urban bus emission standards made them increasingly more stringent in multiple stages depending on fuel type. First, CARB established a more stringent PM emission standard of 0.01 grams per brake horsepower-hour (“g/bhp-hr”) for 2002 and later model year (MY) diesel-fuel, dual-fuel, and bi-fuel urban bus engines produced on or after October 1, 2002, representing an 80-percent reduction from the preexisting PM standard of 0.05 g/bhp-hr.<sup>15</sup> Second, for the 2004 through 2006 MY, the amendments increased the stringency of NO<sub>x</sub>, NMHC, carbon monoxide (“CO”), and formaldehyde standards for all urban bus engines and provided optional standards as well. For urban bus engines other than diesel-fuel, dual-fuel, and bi-fuel engines, the emissions standards for 2004 through 2006 were set at 2.4 g/bhp-hr for NO<sub>x</sub>+NMHC, 15.5 g/bhp-hr for CO, and 0.05 g/bhp-hr for PM (0.07g/bhp-hr PM in-use).<sup>16</sup> For diesel-fueled, dual-fuel, and bi-fuel urban bus engines in the 2004-2006 model years, the standards were set at 0.5 g/bhp-hr NO<sub>x</sub>, representing a 75-percent reduction in the preexisting NO<sub>x</sub> standard; 0.01 g/bhp-hr PM (maintaining the October 2002 standards), 0.05 g/bhp-hr NMHC, 5.0 g/bhp-hr CO, and 0.01 g/bhp-hr formaldehyde. Third, beginning with the 2007 MY, all urban bus engines (regardless of fuel type) had to meet more stringent emission standards for NO<sub>x</sub> at 0.2 g/bhp-hr, NMHC at 0.05 g/bhp-hr, CO at 5.0 g/bhp-hr, and formaldehyde at 0.01 g/bhp-hr.<sup>17</sup>

The 2000 urban bus rulemaking also amended the “California Exhaust Emission Standards and Test Procedures for 1985 and Subsequent Model Heavy-

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<sup>15</sup> CARB, “Overview of the 2000, 2002, 2004, and 2005 Transit Agency and Urban Bus Rulemakings,” EPA-HQ-OAR-2012-0745-0007, (November 2009), at page 1.

<sup>16</sup> These standards were set for urban buses in a 1998 CARB rulemaking for heavy heavy-duty diesel engines, which established standards for the 2004 and later MY. *Id.* at 2.

<sup>17</sup> *Id.* at 2.

Duty Diesel Engines and Vehicles” to be consistent with the urban bus standards described above. Additionally, the smog index label specifications and the incorporated Label Specifications were amended to be consistent with the requirements of the urban bus standards.<sup>18</sup>

## *2. 2002 Rulemaking*

In the 2002 urban bus amendments, CARB allowed manufacturers of MY 2004-2006 diesel-fuel, dual-fuel, and bi-fuel urban bus engines to sell engines that did not meet the 2000 adopted standards (0.5 g/bhp-hr NO<sub>x</sub>, representing a 75-percent reduction in the preexisting NO<sub>x</sub> standard; 0.01 g/bhp-hr PM (maintaining the October 2002 standards), 0.05 g/bhp-hr NMHC, 5.0 g/bhp-hr CO, and 0.01 g/bhp-hr formaldehyde,) to an exempted public transit agency as long as the engine was certified either to the standards that continued as the primary standards for MY 2004-2006 alternative fuel bus engines (2.4/2.5 g/bhp-hr NO<sub>x</sub>+NMHC), or to the optional October 2002-2003 standards for diesel-fuel engines of NO<sub>x</sub>+NMHC standards between 1.8 and 0.3 g/bhp-hr, in 0.3 g/bhp-hr increments.<sup>19</sup>

Additionally, CARB adopted a new interim certification procedure that could be used to determine the compliance of 2004 and later model year hybrid electric buses (HEB) with the urban bus standards. The purpose of providing this new procedure was to facilitate quantification of the emission benefits of the hybrid-electric drive system in various HEB platforms.<sup>20</sup>

## *3. 2004 Rulemaking*

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<sup>18</sup> CARB, “Clean Air Act §209(b) Waiver Support Document Submitted by the California Air Resources Board,” EPA-HQ-OAR-2012-0745-0004, (November 2009), at page 9.

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.* at 9.

The 2004 urban bus amendments relaxed the NO<sub>x</sub> exhaust emission standard for model years 2004-2006 from 0.5 g/bhp-hr to 1.8 g/bhp-hr for diesel fuel hybrid-electric buses sold to a public transit agency that has been authorized by the Executive Officer of CARB to acquire such buses, as long as the transit agency demonstrates it will undertake measures to mitigate the excess NO<sub>x</sub> emissions.<sup>21</sup>

#### *4. February 2005 Rulemaking*

The February 2005 amendments corrected the 2004-2006 MY emission standards for diesel hybrid-electric engines used in urban buses. When the standards were amended in the 2004 rulemaking, CARB inadvertently omitted the then-existing standards for NMHC and CO. The February 2005 amendments reinserted the engine exhaust emission standards of 0.5 g/bhp-hr for NMHC and 15.5 g/bhp-hr for CO, and removed the formaldehyde standard.<sup>22</sup>

#### *5. October 2005 Rulemaking*

The October 2005 amendments aligned the urban bus exhaust emission standards with California's existing exhaust emission standards for heavy-duty diesel-cycle engines, for which a federal waiver of preemption had already been granted.<sup>23</sup> The alignment allows the urban bus manufacturers to use averaging, banking, and trading (ABT) and other provisions in California's heavy-duty engine testing and certification procedures. The alignment also allowed for the following standards to be phased in through MY 2010: 0.02 g/bhp-hr NO<sub>x</sub>, 0.14 g/bhp-hr NMHC, 0.01 g/bhp-hr PM, 15.5 g/bhp-hr CO, and 0.05 g/bhp-hr formaldehyde.

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<sup>21</sup> CARB, "Overview of the 2000, 2002, 2004, and 2005 Transit Agency and Urban Bus Rulemakings," EPA-HQ-OAR-2012-0745-0007, (November 2009), at page 3.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> 70 FR 50322 (August 26, 2005).



### *C. EPA's Review of California's Urban Bus Waiver Request*

EPA announced its receipt of California's request for a waiver of preemption pursuant to section 209(b) of the Act for the emission standards and related test procedures contained in its urban bus regulations, as amended through 2000 and 2005 in a *Federal Register* notice on January 4, 2013.<sup>24</sup> In that notice, EPA offered an opportunity for public hearing and comment on CARB's request.

EPA invited comment, with respect to California's emission standards and related test procedures contained in its urban bus regulations, on whether: (a) California's determination that its motor vehicle emission standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious, (b) California needs such standards to meet compelling and extraordinary conditions, and (c) California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Act.

No party requested an opportunity for a hearing to present oral testimony, and EPA did not receive any written comments.

### *D. Clean Air Act New Motor Vehicle Waivers of Preemption*

Section 209(a) of the Act preempts states and local governments from setting emission standards for new motor vehicles and engines; it provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

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<sup>24</sup> 78 FR 719 (January 4, 2013).

Through operation of section 209(b) of the Act, California is able to seek and receive a waiver of section 209(a)'s preemption. If certain criteria are met, section 209(b)(1) of the Act requires the Administrator, after notice and opportunity for public hearing, to waive application of the prohibitions of section 209(a). Section 209(b)(1) only allows a waiver to be granted for any state that had adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the state determines that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards (*i.e.*, if such state makes a “protectiveness determination”). Because California was the only state to have adopted standards prior to 1966, it is the only state that is qualified to seek and receive a waiver.<sup>25</sup> The Administrator must grant a waiver unless she finds that: (A) California's above-noted “protectiveness determination” is arbitrary and capricious;<sup>26</sup> (B) California does not need such State standards to meet compelling and extraordinary conditions;<sup>27</sup> or (C) California's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.<sup>28</sup> EPA has previously stated that consistency with section 202(a) requires that California's standards must be technologically feasible within the lead time provided, giving due consideration to costs, and that California and applicable federal test procedures be consistent.<sup>29</sup>

The second sentence of section 209(a) of the Act prevents states from

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<sup>25</sup> See S.Rep. No. 90-403 at 632 (1967).

<sup>26</sup> CAA § 209(b)(1)(A).

<sup>27</sup> CAA § 209(b)(1)(B).

<sup>28</sup> CAA § 209(b)(1)(C).

<sup>29</sup> See, *e.g.*, 74 FR 32767 (July 8, 2009); see also *Motor and Equipment Manufacturers Association v. EPA (MEMA I)*, 627 F.2d 1095, 1126 (D.C.Cir. 1979).

requiring, “certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.” However, once EPA has granted California a waiver of section 209(a)’s preemption for emission standards and/or accompanying enforcement procedures, California may then require other such conditions precedent.<sup>30</sup> EPA can confirm that a California requirement is a condition precedent to sale, titling, or registration, if: (1) the requirements do not constitute new or different standards or accompanying enforcement procedures, and (2) the requirements do not affect the basis for the previous waiver decision.

In contrast to section 209(a)’s preemption of state adoption of standards controlling emissions from new motor vehicles and motor vehicle engines, section 209(d) of the Act explicitly preserves states’ ability to regulate vehicles and engines in use. Section 209(d) provides that despite section 209(a)’s preemption, “Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.”<sup>31</sup>

#### *E. Deference to California*

In previous waiver decisions, EPA has recognized that the intent of Congress in creating a limited review based on the section 209(b)(1) criteria was to ensure that

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<sup>30</sup> “Once California receives a waiver for standards for a certain class of motor vehicles, it need only meet the waiver criteria of section 209(b) for regulations pertaining to those vehicles when it adopts new or different standards or accompanying enforcement procedures. Otherwise, California may adopt any other condition precedent to the initial retail sale, titling, or registration of those vehicles without the necessity of receiving a further waiver of Federal preemption.” 43 FR 36680 (August 18, 1978).

<sup>31</sup> See also *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1094 (D.C.Cir. 1996).

the federal government did not second-guess state policy choices. This has led EPA to state:

It is worth noting \* \* \* I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to “catch up” to some degree with newly promulgated standards. Such an approach \* \* \* may be attended with costs, in the shaped of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California’s judgments on this score.<sup>32</sup>

EPA has stated that the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on “ambiguous and controversial matters of public policy” to California’s judgment.<sup>33</sup>

This interpretation is supported by the House Committee Report discussion of the 1977 amendments to the Clean Air Act. Congress had the opportunity to restrict the waiver provision, but elected instead to expand California’s flexibility to adopt a complete program of motor vehicle emission controls. The amendment is intended to ratify and strengthen the California waiver provision and to affirm the underlying

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<sup>32</sup> 40 FR 23103-23104 (May 28, 1975); *see also* LEV I Decision Document at 64 (58 FR 4166 (January 13, 1993)).

<sup>33</sup> 40 FR 23104 and 58 FR 4166.

intent of that provision, *i.e.*, to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.<sup>34</sup>

*F. Burden of Proof*

In *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979)

(*MEMA I*), the U.S. Court of Appeals for the D.C. Circuit stated that the

Administrator's role in a section 209 proceeding is to:

consider all evidence that passes the threshold test of materiality and ... thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended a denial of the waiver.<sup>35</sup>

The court in *MEMA I* considered the standards of proof under section 209 for the two findings related to granting a waiver for an "accompanying enforcement procedure" (as opposed to the standards themselves): (1) protectiveness in the aggregate and (2) consistency with section 202(a) findings. The court instructed that "the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision."<sup>36</sup>

The court upheld the Administrator's position that, to deny a waiver, there must be 'clear and compelling evidence' to show that proposed procedures undermine the protectiveness of California's standards.<sup>37</sup> The court noted that this standard of proof also accords with the congressional intent to provide California with the

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<sup>34</sup> *MEMA I*, 627 F.2d at 1110 (*citing* H.R.Rep. No. 294, 95 Cong., 1st Sess. 301-02 (1977)).

<sup>35</sup> *MEMA I*, 627 F.2d at 1122.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

broadest possible discretion in setting regulations it finds protective of the public health and welfare.<sup>38</sup>

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for “standards,” as compared to accompanying enforcement procedures, there is nothing in the opinion to suggest that the court’s analysis would not apply with equal force to such determinations. EPA’s past waiver decisions have consistently made clear that: “even in the two areas concededly reserved for Federal judgment by this legislation – the existence of ‘compelling and extraordinary’ conditions and whether the standards are technologically feasible – Congress intended that the standards of EPA review of the State decision to be a narrow one.”<sup>39</sup>

Opponents of the waiver bear the burden of showing that the criteria for a denial of California’s waiver request have been met. As found in *MEMA I*, this obligation rests firmly with opponents of the waiver in a section 209 proceeding:

[t]he language of the statute and it’s legislative history indicate that California’s regulations, and California’s determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.<sup>40</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *See, e.g.*, 40 FR 21102-103 (May 28, 1975).

<sup>40</sup> *MEMA I*, 627 F.2d at 1121.

The Administrator's burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: "here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as 'arbitrary and capricious.'"<sup>41</sup> Therefore, the Administrator's burden is to act "reasonably."<sup>42</sup>

## II. Discussion

California's urban bus regulations elevated the stringency of exhaust emission standards and test procedures for heavy-duty urban bus engines and vehicles. It is CARB's contention that the new emission standards and test procedures for new urban buses and engines meet the criteria for a new waiver of preemption. The Administrator must grant a waiver unless the Administrator finds that: (a) California's "protectiveness determination" is arbitrary and capricious;<sup>43</sup> (b) California does not need such state standards to meet compelling and extraordinary conditions;<sup>44</sup> or (c) California's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.<sup>45</sup> As noted above, consistency with section 202(a) requires that California's standards must be technologically feasible within the lead time provided, giving due consideration to costs, and that California and applicable federal test procedures be consistent.<sup>46</sup>

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<sup>41</sup> *Id.* at 1126.

<sup>42</sup> *Id.* at 1126.

<sup>43</sup> CAA § 209(b)(1)(A).

<sup>44</sup> CAA § 209(b)(1)(B).

<sup>45</sup> CAA section 209(b)(1)(C).

<sup>46</sup> *See, e.g.*, 74 FR 32767 (July 8, 2009); *see also* Motor and Equipment Manufacturers Association v. EPA (*MEMA I*), 627 F.2d 1095, 1126 (D.C.Cir. 1979).

### *A. California's Protectiveness Determination*

Section 209(b)(1)(A) of the Clean Air Act requires EPA to deny a waiver if the Administrator finds that California was arbitrary and capricious in its determination that its State standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards. When evaluating California's protectiveness determination, EPA generally compares the stringency of the California and federal standards at issue in a given waiver request.

CARB approved more stringent emission standards for new urban transit buses and engines and the corresponding test procedures by Resolution 00-2 (February 24, 2000), Resolution 02-30 (October 24, 2002), Resolution 04-19 (June 24, 2004), Resolution 05-15 (February 24, 2005), and Resolutions 05-53 and 05-61 (October 20 and 27, 2005, respectively).<sup>47</sup> In the respective Resolutions, CARB determined that the amendments "would not cause California's emission standards, in the aggregate, to be less protective of public health and welfare than the applicable federal standards."<sup>48</sup> The amended California standards align with, or are more stringent than, the applicable federal urban bus standards for NO<sub>x</sub>, NMHC, PM, and CO for each of the respective model years covered by the amendments.<sup>49</sup>

There were no comments that expressed an opinion, nor has there been any evidence presented, suggesting that CARB was arbitrary and capricious in making its above-noted protectiveness findings. Based on the record, EPA cannot find that California was arbitrary and capricious in its findings that California's new urban bus

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<sup>47</sup> See EPA-HQ-OAR-2012-0745 for copies of Resolutions.

<sup>48</sup> CARB, "Clean Air Act §209(b) Waiver Support Document Submitted by the California Air Resources Board," EPA-HQ-OAR-2012-0745-0004, (November 2009), at page 13.

<sup>49</sup> See *Id.* at 5; and see *Id.* at 13.



emission standards, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

*B. California's Need for State Standards to Meet Compelling and Extraordinary Conditions*

Under section 209(b)(1)(B) of the Act, EPA cannot grant a waiver if California “does not need such State standards to meet compelling and extraordinary conditions.” To evaluate this criterion, EPA considers whether California needs its separate emission standards and test procedures to meet compelling and extraordinary conditions.

Over the past forty years, CARB has repeatedly demonstrated the need for its motor vehicle emissions program to address compelling and extraordinary conditions in California.<sup>50</sup> In the aforementioned Resolutions, CARB affirmed its longstanding position that California continues to need its own emission standards and test procedures to meet its serious air pollution problems. Likewise, EPA has consistently recognized that California continues to have the same “geographical and climatic conditions that, when combined with the large numbers and high concentrations of automobiles, create serious pollution problems.”<sup>51</sup> Furthermore, there were no comments presenting any argument or evidence to suggest that California no longer needs separate emission standards and test procedures to address compelling and extraordinary conditions in California. Therefore, EPA has determined that we

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<sup>50</sup> See, e.g., Approval and Promulgation of State Implementation Plans; California – South Coast, 64 FR 1770, 1771 (January 12, 1999). See also 69 FR 23858, 23881-90 (April 30, 2004) (designating 15 areas in California as nonattainment for the federal 8-hour ozone national ambient air quality standard).

<sup>51</sup> 49 FR 18887, 18890 (May 3, 1984); see also 76 FR 34693 (June 14, 2011), 74 FR 32744, 32763 (July 8, 2009), and 73 FR 52042 (September 8, 2008).

cannot deny California a waiver for its new urban bus standards under section 209(b)(1)(B).

*C. Consistency with Section 202(a) of the Clean Air Act*

Under section 209(b)(1)(C) of the Act, EPA must deny a California waiver request if the Agency finds that California standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. The scope of EPA's review under this criterion is narrow. EPA has stated on many occasions that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are inconsistent with section 202(a). Previous waivers of federal preemption have stated that California's standards are not consistent with section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that time. California's accompanying enforcement procedures would be inconsistent with section 202(a) if the federal and California test procedures conflict, *i.e.*, if manufacturers would be unable to meet both the California and federal test requirements with the same test vehicle.

*1. Lead Time is Adequate for Manufacturer Compliance*

CARB asserts that given the submission date of the waiver request (November 16, 2009), the technological feasibility of the amendments cannot be disputed given the fact that manufacturers have been able to certify engines in the lead time provided.<sup>52</sup>

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<sup>52</sup> See CARB, "Clean Air Act §209(b) Waiver Support Document Submitted by the California Air Resources Board," EPA-HQ-OAR-2012-0745-0004, (November 2009), at pages 15-19.

EPA received no comments indicating that CARB's urban bus amendments present lead-time or technology issues with respect to consistency under section 202(a) and the agency knows of no other evidence to that effect. Thus, EPA is unable to find that California's urban bus standards are not technologically feasible within the available lead-time, giving appropriate consideration to the cost of compliance.

## *2. Consistency of Test Procedures*

With regard to the consistency of the California test procedures with the applicable federal test procedures, CARB has adopted certification requirements in the 2000 rulemaking that are nearly identical to those adopted and affirmed by the EPA.<sup>53</sup> Although the 2002 adopted Interim Certification Procedure for HEB is a new accompanying test procedure, it is optional, and the general test procedures and requirements necessary for certifying a diesel or gasoline heavy-duty engine for sale in California may continue to be used by manufacturers for certification of urban bus engines.<sup>54</sup> CARB asserts it is not aware of any instance in which a manufacturer is precluded from conducting a single set of tests on an urban bus engine to determine compliance with both the California and federal emission standards.<sup>55</sup>

EPA received no comments expressing any disagreement with these statements from CARB, and no comments presenting any evidence opposing CARB's assertions regarding consistency with federal test procedures. EPA is unable to find that California's urban bus test procedures impose requirements inconsistent with federal test procedures.

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<sup>53</sup> 65 FR 59896 (October 6, 2000).

<sup>54</sup> CARB, "Clean Air Act §209(b) Waiver Support Document Submitted by the California Air Resources Board," EPA-HQ-OAR-2012-0745-0004, (November 2009), at page 20.

<sup>55</sup> *Id.*

For the reasons set forth above, California's urban bus standards and accompanying enforcement procedures are not inconsistent with section 202(a) of the Act.

#### *D. Other Issues*

The 2000 rulemaking required the addition of information to the emission control label for urban bus engines to help identify the engines certified to the optional emission standards.<sup>56</sup> CARB asserts that because the labels do not pertain to a manufacturer's ability to certify and produce engines that comply with the applicable emission standards, the emission control label specifications are not standards or accompanying enforcement procedures.<sup>57</sup> The specifications are, however, subject to federal preemption under CAA section 209(a) because the specifications are a condition precedent to the initial retail sale of the new engines in California.<sup>58</sup> EPA has stated that "once California has received a waiver of federal preemption for its standards and enforcement procedures for a class of vehicles, it may adopt other conditions precedent to initial retail sale, titling or registration of the subject class of vehicles without the necessity of receiving a further waiver of federal preemption."<sup>59</sup> In the instant case, CARB states that it has received previous waivers for urban bus engines.<sup>60</sup> Therefore, CARB need not demonstrate that the labeling specifications independently meet the waiver criteria. EPA agrees with this

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See, e.g.*, 49 FR 18887 (May 5, 1984), 47 FR 1015 (January 8, 1982), and 46 FR 36237 (July 14, 1981).

<sup>59</sup> 46 FR 36742 (July 15, 1981), 45 FR 54131 (August 14, 1980), and 43 FR 36579 (August 18, 1978).

<sup>60</sup> *See, e.g.*, 68 FR 75500 (December 31, 2003).

assessment and the labeling specifications may be enforced in California without further action by the Administrator.<sup>61</sup>

*E. Full Waiver of Preemption Determination for California's Urban Bus Standards*

After a review of the information submitted by CARB, and given there were no parties opposing California's request, EPA finds that California's urban bus standards should receive a full waiver of preemption.

**III. Decision**

The Administrator has delegated the authority to grant California section 209(b) waivers of preemption and section 209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating CARB's urban bus emission standards and test procedures and CARB's submissions, EPA is taking the following action. EPA is granting a waiver of preemption to California for its urban bus emission standards and test procedures as they affect the 2002 and later model years.

My decision will affect not only persons in California, but also manufacturers outside the State who must comply with California's requirements in order to produce vehicles for sale in California. For this reason, I determine and find that this is a final action of national applicability for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by [INSERT DATE SIXTY DAYS AFTER FR PUBLICATION DATE OF THIS NOTICE]. Judicial review of this final action may

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<sup>61</sup> CARB, "Clean Air Act §209(b) Waiver Support Document Submitted by the California Air Resources Board," EPA-HQ-OAR-2012-0745-0004, (November 2009), at page 21.

not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

#### **IV. Statutory and Executive Order Reviews**

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. § 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. § 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. § 804(3).

Dated: July 15, 2013

Gina McCarthy  
Assistant Administrator  
Office of Air and Radiation

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